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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

ORIGINAL

In the Matter of

Implementation of Section
309(j) of the Communications Act
Competitive Bidding

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PP Docket No. 93-253

To: The Commission

COMMENTS

David L. Nace
Pamela L. Gist
LUKAS, MCGOWAN, NACE
& GUTIERREZ, CHARTERED
1819 H Street, N. W.
Seventh Floor
Washington, D. C. 20006
(202) 857-3500

Attorneys for the ALLIANCE OF
RURAL AREA TELEPHONE AND
CELLULAR SERVICE PROVIDERS

November 10, 1993

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SUMMARY

The Alliance of Rural Area Telephone and Cellular Service Providers submits comments in the referenced proceeding from the viewpoint of small, independently owned and operated common carrier service providers who intend to offer new radio technology services within their own geographical market areas.

In particular, these comments suggest that entities designated for preferential treatment in the competitive bidding process should include rural telephone companies which serve either (1) communities with populations of no more than 10,000, (2) no more than 10,000 access lines in any community, or (3) no more than an average of 15 subscribers per mile of plant. The preference should be extended to the companies' affiliates, but the preference should not be extended in defined market areas where the company has no presence of service.

The designated entities should also include small businesses which meet the definition provided by the Small Business Administration, but additionally they should be required to have an operating presence in the market area applied for.

If designated entities are to include minorities and women, residential requirements and income limitations should be imposed upon them as well.

Designated entities successful in the bidding process should be permitted to choose between ten-year installment payments, with interest, or royalties on revenues produced from the acquired

spectrum. Tax certificates should be available for deferral of income, and the license should require a one-year holding period, with automatic cancellation upon premature transfer. These and other preferences and requirements should apply to any license acquisition from competitive bidding by a successful designated entity, whether or not the spectrum is "set-aside" for designated entities.

The application process should be streamlined. The financial qualifications of a bidder should be demonstrated by presentation of an upfront payment; the amount of two cents per megahertz per pop is acceptable. Sharing of information prior to bidding, consortia, and even full market settlements should be allowed in the interest of expediting service to the public.

There should be no minimum bids, and no long form applications. Bidding individuals should be publicly identified in advance by photograph filed with the Commission. Markets should be auctioned from largest to smallest. Sealed combinatorial bidding should be permitted only for major trading areas, and in all cases should be followed by renewed oral bidding by all applicants. The winning bidder's deposit should be cashed and retained, unless good cause is shown for a refund.

Auctions should be implemented in a manner that will assure delivery of service to small and rural markets by independent local entities, with economic incentives for participation by rural telephone companies and small businesses.

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 of the Communications Act)
 Competitive Bidding)

To: The Commission

COMMENTS

I. Introduction

1. The Alliance of Rural Area Telephone and Cellular Service Providers (hereafter "the Alliance"),^{1/} by its attorneys, and pursuant to Section 1.415 of the Federal Communications Commission's ("FCC" or "Commission") rules, hereby submits its Comments in the above-captioned proceeding.^{2/}

2. Numerous issues are addressed in the Commission's proposal to develop a regulatory framework for competitive bidding procedures to choose from among mutually exclusive applications for initial licenses for radio communications spectrum to provide service to subscribers for compensation. The Alliance is concerned with issues affecting deployment of radio communications services

^{1/} A list of the companies participating in these Comments is attached. These companies may also participate in this proceeding through comments filed by national telephone and/or cellular industry associations. Through these Comments, the companies wish to emphasize their special concerns on particular subjects.

^{2/} Notice of Proposed Rulemaking, PP Docket No. 93-253, 58 FR 53489, October 15, 1993 ("NPRM").

in rural areas, and the opportunity for existing rural area service providers to participate successfully in the competitive bidding arena.

3. As background, members of the Alliance and their affiliates have endeavored consistently to provide to their local rural areas services that would not otherwise be available. They have invested capital and brought to their communities local exchange service, cellular and other mobile radio services and video delivery systems. These projects have been undertaken at substantial risk and with varying degrees of financial return, including lack of profit.

4. The members are devoted to innovation in the rural communications network, and have a direct interest in the outcome of the FCC's competitive bidding proceeding. The members are immediately concerned with the implementation of a bidding process for the personal communications services ("PCS"). The topics of their specific concern are addressed in the following paragraphs.

II. Designated Entities

5. The Alliance supports the set aside of two blocks of spectrum nationwide, one of 20 megahertz ("MHz") (Block C) and one of 10 Mhz (Block D) in the broadband PCS service, reserved for bidding purposes to the designated entities. The Alliance also supports the proposed preferences for designated entities, such as installment payment plans and the use of tax certificates.

6. The Alliance urges that the preferences also be extended to designated entities when they bid for non-set-aside blocks of

spectrum. Further, any consortium which is controlled (50.1%) by designated entities should be eligible for preferential measures when it bids for spectrum generally. The preferences would thus apply in both broadband and narrowband PCS.

A. Eligibility Criteria

7. The designated entities should include small businesses and rural telephone companies who meet the following criteria:

Small Business:

Entities, including affiliates under common control (1) whose net worth does not exceed \$6 million, (2) whose average net income after federal income taxes for the preceding two years did not exceed \$2 million, and (3) which conducted a substantial portion of its business in the market area applied for,^{3/} (4) as of the date of the FCC's Public Notice announcing the application filing window for the market area applied for.

Rural Telephone Company:

Local exchange carriers ("LECs"), including affiliates under common control, which (1) provide service within the market area applied for, and (2) which (a) serve no community with a population of over 10,000 within the market area applied for, or which (b) serve no more than 10,000 access lines in any community within the market area applied for, or (c) serve no

^{3/} A substantial portion can be defined by a percentage (20%) of revenue derived from the market area.

more than an average of 15 subscribers per mile of plant in any single community within the market area applied for.

8. The Alliance does not specifically encourage or discourage the creation of a separate classification of designated entity for minorities or women. However, the Alliance submits that if designated, such a person should be required to (1) have his or her principal residence in the market area applied for as of the date of the FCC's Public Notice announcing the application filing window for the market area, and (2) have net worth not exceeding \$6 million and an average net income after federal income taxes for the preceding two years not exceeding \$2 million.

9. To be recognized as a designated entity, the applicant should be controlled (50.1%) by qualified members of any designated group.

B. Bid Payment Methods

10. When the successful bidder for any frequency block in any radio service is a designated entity, alternative payment options should be permitted. The entity should be permitted to select a payment option from a menu of choices. The choices should include, at the least, an installment plan of a term that is equal to the first term of the license (ten years for PCS), with interest charged at the prime rate plus one percent, fixed at the time when the installment payment plan begins.

11. At its election, the designated entity should be permitted to pay a royalty as an alternative to installments. The royalty is particularly appropriate for new services such as PCS,

because of the inherent high risk of introducing a new service to the marketplace, and because of the high cost of removing incumbent users from the spectrum. The royalty should be a percentage of subscriber revenues during the first term of the license. The percentage could be two to five percent, which is similar to the percentages of subscriber revenues paid by cable television operators in the form of franchise fees and copyright royalties.

C. Tax Certificates

12. The tax certificate should be used to defer federal taxation on any transaction involving the transfer or assignment of stock or FCC license to or from a designated entity. Additionally, tax certificates should be granted to any designated entity in amounts equal to the entity's expenditures in relocating existing users of spectrum acquired by the designated entity.

13. While the availability of tax certificates does not relieve any entity from the burden of capital formation, it promotes the ability of the entity to attract investors and to provide them a fair return. The provision of economic opportunity to the designated entities is a stated goal of the Commission, and the employment of tax certificates is suitable to this purpose.

D. Trafficking in Licenses

14. Certain licenses are to be set aside solely for designated entities (i.e., PCS frequency blocks C and D). The Alliance does not oppose a mandatory holding period of one year for these licenses. Premature transfer should cause the license to be

cancelled automatically and then re-auctioned by the FCC, without delay, to another designated entity.

15. The Alliance opposes conditional licenses requiring payment to the federal government of gains upon the event of a license transfer. Automatic cancellation is preferred because it is administratively simple, and because it serves the purpose of discouraging the acquisition of set aside spectrum for quick profit.

III. Application Process

16. Applicants should be required to submit only a short form application, during a one-day filing window, in order to apply to participate in a PCS auction. The form should identify the applicant, the market for which the applicant will bid, and the identity and front facial photograph of the individual who will be bidding, plus the identity and front facial photograph of up to two alternate bidding individuals. The application should include certification of the applicant's qualifications pursuant to Sections 309(a), 308(b) and 310 of the Communications Act, and it should include certification of the applicant's financial qualifications. The short form should also contain the applicant's ownership and a statement, with certification, claiming any recognition as a designated entity. All information in the application, including the identity of the bidding individual and alternates, should be available for public inspection.

17. For PCS applications in particular, submission of a long form application including the specific technical proposal should

be delayed until after the auction. The proposal of site specific PCS facilities is unwarranted unless and until a particular applicant has become the successful bidder. The technical proposal of unsuccessful bidders is not necessary to the bidding process. A broadband PCS application for commercial service would thus consist of the filing fee of \$230, a Transmittal Sheet, and a new FCC Form (comparable to FCC Form 401-Schedule A) with exhibits, but without technical forms and exhibits.

IV. Application Modifications

18. The Alliance submits that minor amendments to applications should be permitted prior to the auction. Minor changes in ownership should be permitted, as well as any (including major) ownership changes necessitated by the winning of another auction by an affiliated entity. Prior to auction, applicants should be permitted to adjust ownership in any manner in order to maintain compliance with the eligibility rules.

19. After completion of the auction, however, if an eligibility impediment is identified in the winning applicant, the applicant should not be permitted to modify its ownership; if the impediment is deemed fatal to the application, the win (including the upfront payment) should be forfeited.

V. Collusion

20. Potential bidders should not be prohibited from collaborating, sharing information or otherwise discussing bids or bidding strategies prior to completion of an auction. Enforcement of such a prohibition would be impractical, and ill-intentioned

parties could easily taint the qualifications of a competing bidder by making accusations of collusion.

21. As a practical matter, it is beyond the duty of the FCC to distinguish between information that may be shared (demographics, market surveys, frequency searches and other information on which a bid is based) and that which may not be shared (market valuation estimates interpolated as actual bids). Also as a practical matter, it is unwise for any party to rely on what another party says it will bid. In sum, it is unwieldy and unnecessary for the FCC to get into the business of regulating the exchange of information.

VI. Consortia

22. The FCC should permit applicants to form consortia after their applications are filed and before the auction commences. Smaller entities could thus team to bid against larger entities, whom they would otherwise have little chance to outbid. The consortia should be required to identify themselves prior to the auction so that other bidders are aware of the new configuration. If a consortium forms among every applicant, then a full market settlement would be reached. The applications would no longer be mutually exclusive, and the auction would be suspended in favor of expedited grant of a license and service to the public.

VII. Upfront Payment and Financial Qualifications

23. In PCS, the upfront payment should constitute the applicant's initial demonstration of its financial qualifications. The upfront payment should be presented, not tendered, at the

auction premises by the individual identified in the application as the bidder. The upfront payment should be examined, but not collected by the responsible FCC officials. Proper presentation should be a condition of entry to the bidder's arena on the auction premises.

A. Form

24. The upfront payment should be in the form of a cashier's check drawn in U.S. dollars on a federally chartered bank or federally chartered savings and loan institution, payable to the FCC. It should not be required that the check be drawn on a bank or savings and loan with assets in excess of one billion dollars because this would prohibit applicants from using the institutions with which they deal in current business matters and with whom relations are established. Any cashier's check in proper form and amount should be acceptable for presentation at the auction.

25. The upfront payment of the auction winners only should be deposited by the Commission. It is unjust for large amounts of money to be collected from all who participate in auctions, knowing that most of the money will be returned. It is also wasteful to collect the money, knowing that it could otherwise be used in other auctions or to promote other business interests. Finally, it would be inequitable to fail to pay interest on bidders' deposits held by the FCC, but the administration of interest payments would be a diversion a federal resources. The result is that only the auction winners' upfront payments should be deposited by the FCC.

B. Amount

26. The Alliance supports the FCC's proposal that the amount of the upfront payment for broadband PCS should be 2 cents per pop per MHz. This will serve as a qualifying factor for all applicants, demonstrating each one's financial ability to become a PCS licensee.

27. With certainty, the FCC should announce the specific upfront payment amount for a given market at least thirty days in advance of the auction.

C. No Long Form Application

28. In PCS, there should be no further requirement of demonstration of the winning bidder's financial ability to construct and operate PCS facilities. The submission of bank letters to support the project is superfluous and too easily manipulated. Bank letters, both credible and phony, are easily obtained for a sum certain, after a cursory review by the issuing institution of the applicant's financial status. The letters themselves tie up the resources of legitimate lending entities and prevent loans for other useful purposes.

29. The high bidder for a PCS license either has the financial ability to construct and operate, or it will fail to meet the coverage requirements required by FCC rules. The natural regulating factor in that situation would be secondary dispensation of the license, such as by assignment to a capable party, or return to the FCC for re-auction.

30. There should likewise be no long form application for technical facilities. The PCS technical parameters are clear in Part 99 of FCC Rules. Facilities can be constructed in accordance therewith and reported to the FCC on a form similar to FCC Form 489. Frequency coordination among systems will continue to be the responsibility of the operators.

VIII. Bidding for Groups of Licenses

31. The Alliance supports the concept of combinatorial bidding through the submission of sealed bids for groups of licenses, but only in the MTAs. The FCC should not permit combinatorial bidding for groups of BTAs. It is generally anticipated that large players and market power will be concentrated in groups of MTAs assembled through combinatorial bidding. The BTAs, on the other hand, should be reserved as an opportunity for smaller, independent operators who cannot compete with nationwide or regional consortiums.

32. By their nature, BTAs are smaller in size than MTAs, and are more suitable for local control and operation. Larger geographical areas, on the other hand, are perceived as being more valuable than smaller areas, and appropriate for operation by highly capitalized entities. The assemblage of BTAs for group bidding would raise the cost beyond what is affordable by bidders for individual BTAs, and defeat the planning of small companies who apply to bid singly for BTAs.

33. There already exists a lack of incentive for an individual company to prepare to bid (at no small cost) for an MTA

frequency block. The prospect of bidding against multi-billion dollar national consortiums persuades the individual company to forego the fray in the MTA market. If combinatorial bidding is allowed in the BTAs, the increased competition would dissuade small company participation, to the detriment of the bidding process and of local public service.

IX. No Minimum Bids

34. The Alliance concurs with the Commission that no minimum bid price should be set for new services such as PCS. In fact, the Alliance opposes minimum bids for any radio service. The Commission suggests that minimum bids may be appropriate where the spectrum has an established value in the marketplace. However, the Alliance believes that the winning bid price is by definition the market value, regardless of whether it meets prior expectations.

X. Sequence of Bidding

35. The FCC should auction all frequency blocks within a given market area before proceeding to auction licenses in the next market area. The blocks within an area should be auctioned on the same day in order to avoid a headstart advantage to the first successful bidder. The blocks should be auctioned in the order of largest to smallest. For example, all PCS frequency blocks, in the order of A, B, C, D, E, F and G, should be auctioned on a single day for a given major trading ("MTA") area or basic trading area ("BTA"). The successful bidders in the market will thus have the same starting point in the race to service.

36. The markets should be auctioned in the order of largest to smallest based on population. This will permit bidders for the smaller markets to estimate the amount above which the bidding will not go, and plan accordingly.

XI. Final Offer

37. Where combinatorial bidding is allowed, it is the opinion of the Alliance that all of the oral bidders should be permitted to participate in an additional round of counteroffer bidding. All participants in the oral round will have met all threshold qualifications to bid, and they should not be prevented from full participation once the amounts of the sealed bids are made known.

38. To implement this concept, the Alliance proposes that if a combinatorial MTA bid exceeds the sum of the individual winning MTA bids, then the oral auction should be reopened for all of the affected MTAs, and all of the oral bidders from the first round should remain eligible to continue bidding for their respective MTAs. Then the sum of individual offers would again be compared to the combinatorial bid amount. Once the final highest amount is ascertained, the winner(s) would be declared.

39. This practice would promote the award of MTA licenses to those who value them most highly, with no undue restriction on the eligibility of first-round bidders.

XII. Deposit

40. The winning bidder's twenty percent deposit should be tendered to the Commission by cashier's check within thirty days after the auction date. This allows time for the winning bidder to

verify the required deposit amount, and to clear into a particular account the funds necessary upon which to draw the cashier's check.

41. Failure to make the deposit within thirty days should automatically cancel the winning bid, with forfeiture to the Commission of the upfront payment. In that event, the second high bidder should be given the opportunity to acquire the license at its last bid amount. If it declines to do so, the auction should be reopened among the previously qualified pool of applicants. The pool would include the second high bidder and any other original applicants still willing to participate.

42. The upfront payment and deposit should be forfeited by any applicant who fails to achieve the award of the license for which it applied. However, the Commission should be permitted to consider any special circumstances and, for good cause shown, to refund any amount to the applicant.

43. The existing set of applicants should be continuously reconvened as necessary until a license is awarded. The auction should be opened to new bidders only in circumstances where the license is awarded and later forfeited or revoked. For example, if a designated entity licensee fails to make timely installment payments for a broadband PCS license, the license should be cancelled and new applications should be received by the Commission for a new auction of the spectrum.

XIII. Petitions to Deny

44. After payment of the deposit and after submission of the long form application, the winning application should be placed on

public notice for thirty days. Petitions to deny should be filed during this time, and the applicant's replies filed afterward.

45. The Alliance agrees with the Commission that it should not be required to conduct hearings before an administrative law judge ("ALJ") to consider challenges to the applicant's qualifications or substantial issues of fact. The Commission should use written proceedings with the participation of FCC staff, rather than ALJs or the Commission itself.

XIV. Time for Commencement of PCS

46. The Alliance is aware that the Omnibus Budget Reconciliation Act of 1993 requires the Commission to commence issuing PCS licenses and permits in by May 7, 1994. In light of the extraordinary task of adopting fair and comprehensive competitive bidding procedures in time for the auction and licensing of PCS, the Alliance suggests that the Commission seek legislative relief from the May 7, 1994 deadline.

47. It is of greater importance to members of the Alliance, as prospective PCS providers, to enter the PCS industry on a strong procedural platform than to have permits issued by a date certain. Should one of the members be privileged to win a bid for PCS spectrum, it would more likely make immediate investment in PCS facilities if there are no serious procedural challenges to the bidding process. Furthermore, if a member were to receive a PCS permit on May 7, 1994, it could conceivably find that PCS equipment vendors are not ready for the market. For these reasons, the FCC

should request from Congress a legislative delay of the date for mandatory PCS licensing.

Conclusion

The Alliance supports the FCC's efforts to expeditiously implement competitive bidding procedures that are equitable and inclusive of all interested and qualified bidders. The system of preferences for designated entities should ensure opportunity for small parties and encourage the development of PCS in small and rural markets. The Alliance encourages adoption of a simple scheme for the auction of PCS and other radio services, and one that will remain within the financial means of individuals and small firms.^{4/}

Respectfully submitted,

ALLIANCE OF RURAL AREA TELEPHONE
AND CELLULAR SERVICE PROVIDERS

By: Pamela L. Gist
David L. Nace
Pamela L. Gist

Its Attorneys

Lukas, McGowan, Nace & Gutierrez
1819 H Street, N.W., Seventh Floor
Washington, D.C. 20006
(202) 857-3500

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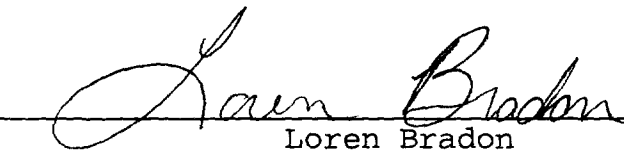
^{4/} The Alliance will monitor the FCC's rule making proceeding with continued interest, and members of the Alliance, as a group or individually, may participate in reply comments.

Alliance of Rural Area Telephone and Cellular Service Providers

Appalachian Cellular General Partnership (Kentucky)
 Atlantic Telephone Membership Corporation (North Carolina)
 BMCT, L.P. (Oregon & Washington)
 Curtis Telephone Company (Nebraska)
 Delta Telephone Company, Inc. (Mississippi)
 ETEX Telephone Cooperative, Inc. (Texas)
 Filer Mutual Telephone Company
 Franklin Telephone Company, Inc. (Mississippi)
 Granite State Telephone, Inc. (New Hampshire)
 Hargray Telephone Company (South Carolina)
 Millington Telephone Company, Inc. (Tennessee)
 North Carolina RSA 3 Cellular Telephone Company
 d/b/a Carolina West Cellular (North Carolina)
 Northwestern Indiana Telephone Company, Inc. (Indiana)
 Oregon-Idaho Utilities, Inc. (Oregon & Idaho)
 The Orwell Telephone Company (Ohio)
 Plant Telephone Company (Georgia)
 Project Mutual Telephone Cooperative Association, Inc. (Idaho)
 Pioneer Telephone Association Incorporated (Kansas)
 Pioneer Telephone Cooperative, Inc. (Oklahoma)
 Rural Telephone Company (Idaho)
 Union Telephone Company (Wyoming, Colorado & Utah)
 The Volcano Telephone Company (California)
 Yadkin Valley Telephone Membership Corporation (North Carolina)

CERTIFICATE OF SERVICE

I, Loren Bradon, a secretary in the law offices of Lukas, McGowan, Nace & Gutierrez, Chartered, hereby certify that I have on this 10th day of November 1993 sent, via hand delivery, a copy of the foregoing COMMENTS to the persons named below.


Loren Bradon

Acting Chairman James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Kathleen Levitz, Acting Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Ralph A. Haller, Chief
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Commissioner Ervin S. Duggan
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Thomas P. Stanley, Chief
Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W., Room 7102
Washington, D.C. 20554

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

John Cimko, Jr., Chief
Mobile Services Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 644
Washington, D.C. 20554

Robert M. Pepper
Chief, Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, D.C. 20554

International Transcription Service
Federal Communications Commission
1919 M Street, N.W., Room 246
Washington, D.C. 20554